No. 77-1226

In the Supreme Court of the United States

OCTOBER TERM, 1977

VARIOUS ARTICLES OF OBSCENE MERCHANDISE, BRUCE LONG, CLAIMANT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 21a-36a) are reported at 562 F. 2d 185. The opinion of the district court (Pet. App. 1a-20a) is reported at 433 Supp. 1132.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1977. A petition for rehearing was denied on November 2, 1977. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including March 2, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 19 U.S.C. 1305, which prohibits, *inter alia,* the importation of obscene material, violates the First Amendment because it requires the hearing on obscenity to take place in the community of the port of entry rather than the community where the recipient resides.

STATEMENT

This case arises out of a forfeiture proceeding instituted by the government in the United States District Court for the Southern District of New York to determine whether a particular imported magazine was subject to forfeiture on the ground that it was imported into the United States in violation of 19 U.S.C. 1305.

1. The facts are not in dispute. In September 1975, petitioner, a resident of Lancaster, Pennsylvania, was the intended recipient of an illustrated magazine from a friend in West Germany. The magazine, entitled "Stellungen," bears the legend "A Topsy Production, NR 3, Pornography in Color" (Gov't Exh. 8). Aside from a Copenhagen address on the back cover, this is the only writing contained in the entire thirty page magazine. The remainder, including the front and rear covers, is given over to forty full-color photographs of one man and two women engaged in cunnilingus, fellatio, masturbation, and other explicit sexual activity. The magazine was mailed in a plain brown envelope with an ink-stamped German return address and a gummed mailing label with petitioner's address typed in. The testimony at the forfeiture proceeding further showed that Exhibit 8 was bundled in a bulk shipment of similar letter-class envelopes from the same addressor (A. 134, 141, 147).

On September 12, 1975, a customs officer, assigned to the Post Office to search for contraband, opened Exhibit

8 because the color, size, and feel of the envelope led him to believe that it contained a magazine rather than a personal letter (A. 138-139, 141). The magazine was then forwarded to customs officials and on September 15, 1975, the magazine was seized (A. 137, 139). In accordance with weekly practice, customs officials compiled a schedule of items seized during the week and forwarded it to the United States Attorney for the Southern District of New York. On September 24, 1975, an action was commenced seeking the forfeiture, condemnation, and destruction of the items pursuant to 19 U.S.C. 1305 (A. 4-5a). The Clerk of the Court thereupon issued a warrant for the arrest of the articles, which was executed on October 2, 1975 (A. 71, 73). Notice of the seizure was sent to petitioner by both the Customs Service, pursuant to 19 C.F.R. 12.40, and by the United States Attorney, pursuant to local policy (A. 66-75). All but two states were represented among the 559 addressees but only fourteen persons submitted answers to the notice of service (Pet. App. 41a; A. 76-106).

At trial, on November 11, 1975, only petitioner appeared (A. 107-110, 130). The government presented one witness, an employee of the United States Customs Service, who described the procedure followed in identifying and seizing items of foreign mail suspected of being obscene, and who identified the magazine claimed by petitioner as having been one of the articles contained on the week's schedule (A. 135-143). Petitioner, who waived a jury trial, testified in his own behalf (A. 133-134, 148-152).

He stated that his friend in Germany sent him magazines of this type because petitioner found them to be interesting and entertaining but not pornographic (A. 147-148). Petitioner further stated that he was a member of a citizens' committee appointed by the Mayor of Lancaster, Pennsylvania, to determine contemporary

community standards on obscenity (A. 148-149). According to petitioner, materials such as Exhibit 8 are readily available over the counter in Lancaster, and law enforcement officials do not seek to prohibit the dissemination of such material (A. 149). Petitioner also introduced a newspaper summary of the standards set by the citizens' panel in Lancaster (A. 149, 189-190).

2. Following trial, the district court (Judge Frankel) dismissed the complaint (Pet. App. 1a-20a).[1] It found "the procedure under the statute * * * to offend against the First Amendment both in (a) depriving claimants and their local communities of the freedom to read and see things in accordance with their own standards of what is or is not obscene, and (b) failing to afford a less onerous and expensive procedure for the vindication of First Amendment claims to items seized" (Pet. App. 19a). Alternatively, it found that the claimant would in any event prevail in this case since the government failed to establish that the materials were obscene as tested against the local standards of Lancaster, Pennsylvania.

The court of appeals reversed. It concluded that there was no First Amendment infirmity in the statutory procedures and further found that testing obscenity in terms of the community of the port of entry was fully consistent with the congressional intent. Accordingly, it remanded the case to the district court for a determination whether claimant's magazine was obscene under the community standards of the Southern District of New York, where the port of entry was located (Pet. App. 21a-34a).

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[1]Petitioner waived his right to a final decision within 60 days of the filing of the complaint (A. 157-159). See *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363.

ARGUMENT

We approach this case in light of two guiding principles. First, it is clear that:

> Import restrictions and searches of persons or packages at the national borders rest on different considerations and different rules of constitutional law from domestic regulations. The Constitution gives Congress broad, comprehensive powers "[t]o regulate Commerce with foreign Nations." Art. I, §8, cl. 3. Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry.

United States v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 125, cited approvingly in *United States* v. *Ramsey*, 431 U.S. 606, 619.

Second, it is equally beyond dispute that Congress intended that forfeiture proceedings of allegedly obscene materials occur at the port of entry. 19 U.S.C. 1305(a) expressly so provides:

> Upon the seizure of such book or matter such customs officer shall transmit information thereof to the district attorney *of the district in which is situated the office at which such seizure has taken place*, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized [emphasis added].[2]

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[2]The extensive legislative history underlying this statute reveals a clear intent by Congress that venue lay exclusively in the port of entry. E.g., 71 Cong. Rec. 4451, 4461 (1929); 72 Cong. Rec. 5417-5424, 5511, 5519 (1930). See also 72 Cong. Rec. 5417 (1930), where Senator Smoot of Utah, the sponsor of the obscenity provision, was adamantly opposed to permitting the obscene material to be delivered anywhere within the United States.

See also *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 370-375.

In our submission, these principles answer petitioner's claim of First Amendment invalidity.

1. Petitioner contends (Pet. 12-17) that it is unconstitutionally burdensome to require that he litigate the issue of obscenity at the port of entry in New York rather than his own community. This assertion does not withstand analysis.

On the one hand, its adoption would tend to undermine the central purpose of 19 U.S.C. 1305(a).[3] Proceeding with dispatch wholly within the port of entry is essential if the statutory command is to be effectively implemented. As this Court has observed, there is a real difficulty in controlling obscenity once it is inside the country. "Even single copies, represented to be for personal use, can be quickly and cheaply duplicated by modern technology thus facilitating wide-scale distribution." *United States* v. *12 200-Ft. Reels, supra,* 413 U.S. at 129. In short, the danger of indiscriminate distribution of obscene material, if such material is permitted to go beyond the port of entry, is a real and not imagined one. *United States* v. *Orito,* 413 U.S. 139, 143.

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[3]As one Senator noted in debate on the enactment of this provision in 1930, as part of the Tariff Act, "the *minute* there is a suspicion on the part of a revenue or customs officer that a certain book is improper to be admitted into this country, he presents the matter to the district court, and there will be a *prompt* determination of the matter by a decision of that court." 72 Cong. Rec. 5424 (1930), cited approvingly in *United States* v. *Thirty-Seven Photographs, supra*, 402 U.S. at 371 (emphasis in Court's opinion).

As further noted in congressional debate, pornography "is contagious, obscene matter, and ought not to be distributed * * * beyond the port of entry." 72 Cong. Rec. 5423 (1930). See, also, *id.* at 5417-5424.

On the other hand, it is not clear to us that because few claimants appear at the proceedings at the port of entry, the exercise of constitutional rights unduly burdened (see concurring opinion of Judge Mulligan, below Pet. App. 35a-36a). More likely than not, the absence of claimants reflects a realistic appraisal that the materials are in fact not worth retrieving. At least, no contrary showing has been made. See 72 Cong. Rec. 5423 (1930).

Moreover, practical problems militate strongly against petitioner's position. In this case, for example, the magazine sought by petitioner was one of a bulk shipment addressed to various individuals in different states (see *supra*, p. 2). As the court of appeals pointed out (Pet. App. 28a-29a):

> The ports of entry are manned by customs officers who are the only persons on the premises available to make a decision. In fact, the statute provides that seizure shall be made by "the appropriate customs officer". Congress must have known when enacting the statute that there were not customs officers in every city, town and hamlet of the United States. Therefore, inspection would have to take place at the port of entry—in this case, New York. Thereafter, judicial proceedings are to be conducted in "the district in which is situated the office at which such seizure has taken place", here, the Southern District of New York. Nothing in the statute by implication or otherwise, indicates or justifies reference for adjudication to the district of the addressee's residence.

2. Apart from the foregoing argument, petitioner submits the closely related contention that he is deprived of his First Amendment rights by a forfeiture trial in New York since the "community standards" of the Southern District of New York would apply, not those of Lancaster, Pennsylvania, the community in which he resides.

The root fallacy in this position lies in its assumption that the Constitution imposes a requirement as to the precise geographical location in which items, charged to be obscene, must be tested. But *Miller* v. *California*, 413 U.S. 15, rejected only the view that the First and Fourteenth Amendments require that the proscription of obscenity be based on uniform nationwide standards of what is obscene, describing such standards as "hypothetical and unascertainable." 413 U.S. at 31. In so holding, however, the Court did not require as a constitutional matter the substitution of some smaller geographical area. Nothing in *Miller* prohibits the application of a national standard in federal legislation governing importation into the country. And it is settled that less strict local standards afford no immunity. See *Smith* v. *United States,* 431 U.S. 291, 301-308.

In any event, however, petitioner has no basis for insisting that the community standards of the place where he *resides* must be applied. The offense was complete *at the port of entry* and, if a local standard is appropriate, it is that which prevails in New York City, not Lancaster, Pennsylvania.[4]

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[4]The decision in *Shaffer* v. *Heitner*, 433 U.S. 186 has no relevance to this case. *Shaffer* involved a reexamination by this Court of *in rem* jurisdiction based on a potential defendant's contacts with a state. Here, however, there can be no doubt that jurisdiction rested in the Southern District of New York (where the port of entry was located). The allegedly obscene magazine came in through that port and that is where the offense occurred. See *Romano* v. *United States*, 9 F. 2d 522, 523 (C.A. 2); *Callahan* v. *United States*, 53 F. 2d 467, 468 (C.A. 3) affirmed, 285 U.S. 515. See also 72 Cong. Rec. 5424 (1930) ("It becomes a crime as soon as the literature gets into port").

The opponents of the Tariff Act of 1930 argued that each state should be permitted to determine their own standards according to the "current opinion and moral standard of the particular community which then selects its own literature." 71 Cong. Rec. 4439, 4451, 4455 (1929). Despite the warnings of the opposition that the Act would penalize localites and result in inconsistent verdicts by courts, 71 Cong. Rec. 4451, 4459 (1929), the authors of the Tariff Act held fast to the view that only the courts of the port of entry should have jurisdiction. 72 Cong. Rec. 5417, 5419-24, 5511 (1930). Accord, *Four Packages* v. *United States*, 97 U.S. 404, 407-411.

Of course, the district judge must look beyond his own private views. But that is expressly provided for in the order of the court of appeals (Pet. App. 33a).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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